No. 46679-1-II

COURT OF APPEALS, DIVISION II,
FOR THE STATE OF WASHINGTON

CHARLES HAYS and KRISTA HAYS, each individually and a marital community compromised thereof,

Appellants,

v.

STATE FARM INSURANCE COMPANY, a foreign insurance company,

Respondent.

BRIEF OF RESPONDENT
STATE FARM FIRE & CASUALTY COMPANY

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I. INTRODUCTION

Appellants Charles and Krista Hays suffered damage to their home in two separate fires in February 2010. The first fire originated in the kitchen and caused only property damage. The second fire, just ten days later, originated in an aging heater. The home was a total loss.

The Hayses sought to recover for their dwelling and personal property losses under a homeowners' insurance policy issued by respondent State Farm Fire & Casualty Company ("State Farm").[1] State Farm paid both of the Hayses' fire claims following an investigation and two appraisals; however, the Hayses disputed State Farm's valuation of the second claim and demanded payment of a higher amount.

When the Hayses and State Farm continued to disagree on the actual cash value of the Hayses' home and the depreciation rate to be applied to the damaged personal property, the Hayses suggested a dispute resolution process with neutral Roger Howsen. Howsen issued a policy limits award, which State Farm promptly paid.

Despite admitting that State Farm paid the appraised market

[1] The Hayses erroneously identified State Farm as State Farm Insurance Company in their complaint. CP 1.

value of the home and their additional living expenses for the two-year period required by the policy, the Hayses sued State Farm in Pierce County Superior Court to recover damages for what they characterized as State Farm's bad faith claims practices with respect to their second claim. They alleged causes of action for bad faith, violations of the Insurance Fair Conduct Act, Chapter 48.30 RCW ("IFCA"), and violations of the Washington Consumer Protection Act, Chapter 19.86 RCW ("CPA"). When they failed to demonstrate the existence of any genuine issue of material fact warranting a trial, the trial court[2] summarily dismissed their claims at State Farm's request.

The Hayses now appeal, arguing the trial court erred in granting summary judgment on their bad faith and CPA claims because questions of fact remain for trial. They do not appeal the trial court's decision to summarily dismiss their IFCA claim. They engage on appeal in an obvious attempt to obscure the true nature of the parties' dispute. Contrary to their assertions, this case involves a valuation dispute resolved in an agreed dispute resolution proceeding and nothing more.

This Court should affirm because State Farm's investigation

[2] The Honorable Kitty-Ann Van Doorninck.

of the Hayses' claim was reasonable and not in bad faith as a matter of law. Additionally, the Hayses failed to establish that State Farm's allegedly unfair practices impacted the public interest or proximately caused them injury.

II. COUNTERSTATEMENT OF THE ISSUES

State Farm acknowledges the Hayses' assignments of error, but believes the issues associated with those errors are more appropriately formulated as follows:

1. Did the trial court properly dismiss the insureds' bad faith claim on summary judgment where the insurer did not engage in bad faith by timely obtaining two independent appraisals of the insureds' home and promptly paying their claim based on the appraisal most favorable to them?

2. Did the trial court properly dismiss the insureds' CPA claim on summary judgment where the insureds failed to establish the insurer committed a *per se* violation of the CPA and they thereafter failed to prove all five required elements of that claim?

III. COUNTERSTATEMENT OF THE FACTS

The Hayses' introduction and statement of the case are, while accurate, written in a perceptibly lopsided manner meant to cast themselves in the best light possible with the Court. Their approach ignores or downplays a number of significant facts.

For example, the Hayses take great care to describe the two

bedroom manufactured home they owned in Monroe, Washington and the remodel they completed in 2000. Br. of Appellants at 5, 9. But they tellingly neglect to mention that their home was 38-years old at the time of the fires and well past its economic life of 30 years. CP 79, 85.

The Hayses then criticize the second appraisal State Farm obtained from Country Town Appraisal, Inc. ("Country Town"), claiming the appraiser failed to consider their remodel and the extensive upgrades made to it and thus significantly undervalued their home. Br. of Appellants at 1, 9. The appraisal speaks for itself and provides State Farm with a reasonable basis for its valuation. CP 76-90. After considering *both* the remodel and the numerous upgrades,[3] the appraiser valued the replacement cost of the home, including the porch, at $86,000. CP 79, 85. But the economic life of a manufactured home is 30-years with no repairs or alterations, only maintenance. CP 86. In other words, if left on its own, the Hayses' home would be deemed at the end of its useful life in 30 years. CP 86. The appraiser determined the Hayses' home was

[3] The Country Town appraiser specifically noted that "[t]he roof design and roof are new. The siding is now new plywood. The windows are all new vinyl windows. The interior has been changed from panel to drywall. The deck porch is attached." CP 79. He later observed that the "home has such major updating and remodeling it is most likely stronger than the original coach." CP 79.

effectively half its real age, or 19 years, because they had extensively updated it. CP 79, 85-87. He then divided the home's economic life by its effective age according to industry standard, which resulted in a 63% depreciation in value. CP 87. The Hayses never produced a current appraisal of their own. ROP 11.

State Farm paid the deprecated market value of $30,000 based on Country Town's appraisal and comparable sales in the neighborhood. CP 21, 27-28. The Hayses simply refuse to acknowledge that their home was not a single family residence, but a nearly 40-year old manufactured home.

The Hayses also take issue with State Farm's purported delay between June and October 2010 in providing them with a copy of their insurance policy and an explanation of the actual cash value calculations used to determine the value of their home. Br. of Appellants at 7-9. They make much ado about nothing. It is uncontroverted that State Farm promptly responded to the Hayses' October 2010 correspondence and began the process to provide them with the information they were requesting about their claim. CP 71, 92-93. After a good faith mix-up over the Hayses' mailing address, the Hayses received the requested information in December 2010. CP 95, 148, 186. They did not provide State

Farm with proof of their loss until March 21, 2011. CP 106-07. State Farm promptly acknowledged their loss forms and again explained the reasons why it believed the Country Town appraisal was appropriate. CP 109, 112-14. The Hayses disagreed, which eventually led the parties to submit their dispute to Howsen for resolution. CP 73. The Hayses did not request an appraisal as they now claim. CP 73.

Although the Hayses mention the dispute resolution process, they do little to inform the Court about what actually took place. Br. of Appellants at 10. Howsen was asked to determine the actual cash value of the dwelling and to review the personal property items the Hayses believed were overly depreciated. CP 73. The Hayses sought a 14% depreciation rate, while State Farm had applied and paid a 33% depreciation rate. CP 72. Prior to the dispute resolution process, State Farm had agreed to treat the deck in the way most favorable to the Hayses; in other words, if it benefitted them to have the deck subject to their separate $10,000 dwelling extension coverage limit, then State Farm would agree to do so. CP 73. State Farm also agreed to pay the trees, plants, and shrubs costs. CP 73. State Farm continued to pay additional living expenses. CP 73.

Howsen issued his valuation determination in December 2011. CP 73. He valued the actual cash value of the dwelling at $60,603.21, including demolition costs. CP 73. He also awarded the Hayses $10,000 for the appurtenant structure policy limit (which State Farm had agreed to pay); an additional $2,622.52 in adjusted depreciation value on their personal property (at a depreciation rate of 27%); and $3,482.11 for trees, plants, and shrubs (which State Farm had agreed to pay subject to the policy limit).[4] CP 73. State Farm paid the award after offsetting what it had already paid the Hayses in dwelling and personal property coverage and in reimbursement for some of their additional living expenses. CP 73. State Farm expressly advised the Hayses that it required additional information from them with respect to their utilities, meals, and miscellaneous personal expenses to process the submitted additional living expense claim because their policy did not cover their normal monthly expenses. CP 73-74. The Hayses never provided that information. CP 74. In January 2012, State Farm reissued for the third time a check for the initial actual cash value payment. CP 74.

[4] The only difference between the Country Town appraisal and Howsen's award was the amount of depreciation. CP 72-73.

State Farm advised the Hayses again in February 2012 that coverage for their additional living expenses ended 24 months after the date of loss, or on February 18, 2012. CP 74. In total, State Farm paid the Hayses $65,233.87 in dwelling coverage, $30,072.05 in personal property coverage, and $89,205.30 in additional living expenses coverage. CP 74. The Hayses' attempt to characterize their dispute with State Farm as an intentionally manufactured delay or anything other than a valuation dispute is misguided.

The Hayses next argue as fact that State Farm failed to fully compensate them for the damages they suffered in the second fire because State Farm allegedly credited itself with an $8,119.34 payment it made for the personal property damaged in the first fire. Br. of Appellants at 11. The Hayses never asserted this argument as a basis for damages in any of their discovery responses or during their depositions. But even if they had, their attempt to secure a double recovery from State Farm for that damage would be against public policy and Washington law.[5] State Farm paid the Hayses directly for the damage to their kitchen after the first fire. CP 21. They cashed that check, but had not repaired or replaced

[5] *Barney v. Safeco Ins. Co. of Am.*, 73 Wn. App. 426, 428, 869 P.2d 1093 (1994) (noting double recoveries violate public policy "because the applicable measure of damages is public policy with respect to how much a claimant should recover").

the kitchen before the second fire destroyed the home and made it incapable of repair. CP 373. Their suggestion that they were entitled to recover twice for the value of the unrepaired kitchen is perplexing and lacking any legal or factual basis.

The Hayses report that they initially struggled to make their mortgage payments and that they encountered difficulties in replacing their home after the second fire, for which they blame State Farm. Br. of Appellants at 11. While they admit to receiving over $48,000 under their dwelling coverage and almost $29,000 in personal property coverage from the time of their loss to the appraisal award, br. of appellants at 10, they unsurprisingly fail to advise the Court that they did not do anything with those funds once received. CP 69. Although State Farm advised the Hayses in writing that they would not prejudice their claim by using those funds, the Hayses chose not to take immediate action to rebuild their home. CP 74, 128. They also fail to mention that they did not pay rent for two years because State Farm paid their additional living expenses as their insurance policy required.

Finally, the Hayses attempt to obscure one of the most important facts from this Court - State Farm obtained *two independent appraisals* and paid the Hayses' claim based on the

appraisal *most favorable to its insureds*. CP 21.

IV. ARGUMENT IN SUPPORT OF AFFIRMANCE

A. The Trial Court's Decision To Grant Summary Judgment In State Farm's Favor Was Proper

The Hayses contend the trial court erred in granting summary judgment on their bad faith and CPA claims because issues of material fact remain for trial. Br. of Appellants at 4, 13. They attempt to create issues of fact with new assertions and unsubstantiated allegations, much as they did below. None of the "facts" they offer the Court are *material* to the crux of the parties' dispute - the value of the Hayses' claim. The trial court properly dismissed the Hayses' bad faith and CPA claims on summary judgment where they failed to demonstrate any disputed issue of *material* fact regarding those claims.[6]

1. The trial court properly dismissed the Hayses' bad faith claim

The Hayses first contend the trial court erred by granting summary judgment in State Farm's favor on their bad faith claim.

[6] This Court is well aware of the standard of review. The Court reviews summary judgment decisions *de novo*, performing the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). In reviewing dismissal of a claim on summary judgment, the Court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is appropriate where there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c).

Br. of Appellants at 13-18. They assert State Farm breached its statutory and administrative duties of good faith and fair dealing by failing to adequately investigate their claim, by delaying compensation for their losses, and by demonstrating greater concern for its own interests than for theirs. *Id.* at 1, 15, 17. Not so.

An insurer owes a duty of good faith to its policyholder; violation of that duty may give rise to a tort action for bad faith.[7] *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003) (en banc). An insurer has a duty to consider the interests of its insured equally with its own in all matters. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 391, 715 P.2d 1133 (1986); *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000).

To succeed on a bad faith claim, the policyholder must show the insurer's breach of the insurance contract was "unreasonable, frivolous, or unfounded." *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322 (2002). An insurer may breach its broad duty to act in good faith by conduct short of intentional bad faith or fraud, although not by a good faith mistake. *Sharbono v. Universal*

[7] Claims by insureds against their insurers for bad faith are analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by any breach of duty. *See, e.g., Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 388, 823 P.2d 499 (1992).

Underwriters Ins. Co., 139 Wn. App. 383, 410-11, 161 P.3d 406 (2007). Whether an insurer acted in bad faith is a question of fact.[8] *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 796, 16 P.3d 574 (2001). Accordingly, an insurer is entitled to a dismissal of its insured's bad faith claim on summary judgment only if there are no disputed material facts pertaining to the reasonableness of the insurer's conduct under the circumstances or the insurance company is entitled to prevail as a matter of law on the facts construed most favorably to the nonmoving party. *Indus. Indem. Co. of the NW, Inc. v. Kallevig*, 114 Wn.2d 907, 920, 792 P.2d 520 (1990).

The Hayses first contend that State Farm failed to perform a thorough investigation into their claim. Br. of Appellants at 16-18. According to the Hayses, State Farm's violation of the mandatory good faith provision can be established simply by comparing State Farm's final payment to the award ultimately recovered in the dispute resolution proceeding without reference to the circumstances or reasoning underlying the original payment or

[8] Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion. *Ruff v. County of King*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995). The legal inquiry shapes what is a material fact.

Howsen's award. Br. of Appellants at 17. Their argument on this issue is unavailing and disproved by the evidence.

That the Hayses and State Farm ultimately disagreed on the value of the Hayses' claim following State Farm's investigation does not compel a determination that it acted in bad faith. As this Court determined nearly 20 years ago, an insurer should not be held liable for extra-contractual damages when there is a legitimate controversy as to the amount of benefits due. *Keller v. Allstate Ins. Co.*, 81 Wn. App. 624, 633, 915 P.2d 1140 (1996) (quoting 15A GEORGE J. COUCH *ET AL.*, COUCH ON INSURANCE 2D (rev. ed.) § 58:1 (1983) (footnotes omitted)). *See also*, *Rizzuti v. Basin Travel Serv. of Othello, Inc.,* 125 Wn. App. 602, 617, 105 P.3d 1012 (2005) (stating an insurer that makes mistakes in investigating coverage or communicating with an insured is not guilty of bad faith); *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists. Util. Sys.*, 111 Wn.2d 452, 470, 760 P.2d 337 (1988) (noting bona fide disputes over coverage do not make an insurer guilty of bad faith).

Here, as in *Keller*, there was a legitimate controversy over the value of the Hayses' second fire loss claim. The Hayses produced no evidence below that State Farm acted in bad faith when it evaluated and paid their claim but declined to pay the

amount to which they believed they were entitled. In fact, the evidence shows that State Farm was fully apprised of the facts it needed to determine the value of the Hayses' claim. CP 76-90. It had two independent appraisals, the second of which took into account both the improvements made and the age of the manufactured home. It then paid the Hayses' claim based on the appraisal most favorable to them. State Farm's investigation was not undertaken in such a way that it breached its duty of good faith. Its actions were consistent with the requirements imposed by that duty.

The Hayses next contend that State Farm acted in bad faith when it allegedly delayed compensation for their losses by failing to timely provide them with a copy of their insurance policy and by failing to explain the basis for its actual cash value claims decisions. Br. of Appellants at 17. The Hayses arguments are again unavailing and unsupported by the evidence.

Simply stated, the evidence reflects that the Hayses did not request a copy of their insurance policy until October 2010. CP 71, 92-93. State Farm ordered it, but because of a mix-up over the Hayses' mailing address it did not arrive until December 14, 2010. CP 95, 148, 186. As the trial court correctly observed, even if State

Farm had provided the policy sooner, the Hayses would have still had more than 14 months before they exhausted their additional living expense benefits to settle their claim. ROP 24. Furthermore, State Farm explained to the Hayses on no fewer than *four* occasions the manner in which it calculated the actual cash value payment and reiterated that their policy provided for actual cash value. CP 21, 27, 95, 112-18. State Farm also advised them on *two* occasions that accepting the payment was not a release of their claim. CP 74, 128. By the spring of 2011, State Farm had paid over $60,000 to the Hayses to settle their dwelling and personal property claims and was continuing to pay additional living expenses. CP 72. Although the Hayses should have attempted to locate replacement housing during this period, they instead elected not to cash the check and made no discernable efforts to obtain replacement housing.

Finally, the Hayses contend that State Farm violated its duty of good faith by demonstrating greater concern for its own interests than for those of its insured. Br. of Appellants at 15, 17. It did not.

State Farm's duty to give equal consideration to its insured's interests in all matters does not require it to abandon its own rights under the insurance contract. *Mut. of Enumclaw Ins. Co. v. Dan*

Paulson Constr., Inc., 161 Wn.2d 903, 915 n.9, 169 P.3d 1 (2007) (noting the insurer's duty is fiduciary in nature but is something less than a true fiduciary relationship, which would require the insurer to place the insured's interests above its own). State Farm's settlement was properly premised on its analysis of its obligations under the policy.

The Hayses fail to understand that Washington courts have consistently required something more than a simple dispute in claim value to hold an insurer liable for bad faith. In *Anderson*, for example, Division I found bad faith as a matter of law where the insurer failed to disclose the existence of UIM coverage to an unrepresented insured, found no bad faith in the insurer's conduct of the investigation of the claim or in its delay in paying the claim, and found a fact issue for trial as to the amounts the insurer offered in settlement. 101 Wn. App. at 339. In *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 764, 58 P.3d 276 (2002), the insurer denied coverage and failed to defend the insurer without explanation and then offered a tardy, after-the-fact explanation with "a laundry list of exclusions without any analysis or correlation to the particular claims." The insurer also lied about conducting a thorough investigation of the claim and did not respond to requests

for meetings from the insured. *Id.* Nothing akin to the clear-cut misconduct outlined in the cases above is present here. Instead, this case involves a simple valuation dispute resolved in a dispute resolution proceeding.

Viewing the evidence in the light most favorable to the Hayses, reasonable minds could not differ that State Farm conducted a reasonable investigation; accordingly, summary judgment dismissal of the Hayses' bad faith claim was appropriate.

2. The trial court properly dismissed the Hayses' CPA claim[9]

The Hayses next contend the trial court erred by dismissing their CPA claims as a matter of law. Br. of Appellants at 18-29. This is so, they maintain, because the court ignored the evidence they presented. *Id.* They are mistaken. The court considered the evidence in the light most favorable to the Hayses as the non-moving party and ultimately determined they failed to raise a genuine issue of material fact on all of the required elements of their claim. RP 6, 9.

The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or

[9] Whether an action gives rise to a CPA violation is a question of law the Court reviews *de novo*. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009).

commerce." RCW 19.86.020. Its purpose is to "complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts and practices in order to protect the public and foster fair and honest competition." RCW 19.86.920; *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 169, 744 P.2d 1032, 750 P.2d 254 (1987). To prove a private CPA claim, a plaintiff must establish: (1) that the defendant engaged in an unfair or deceptive act or practice, (2) that the act occurred in trade or commerce, (3) that the act impacts the public interest, (4) that the plaintiff suffered injury to his or her business or property, and (5) that the injury was causally related to the unfair or deceptive act. *Panag*,166 Wn.2d at 37. Failure to satisfy even one element is fatal to a CPA claim. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 793, 719 P.2d 531 (1986).

An insured can establish the first and second elements of a CPA claim by establishing the insurer acted in bad faith or violated any of the standards contained in WAC 284-30-330 through 30-410. *Anderson*, 101 Wn. App. at 329. Because the Hayses cannot establish bad faith on State Farm's part, they cannot establish a *per se* violation of the CPA on that basis. Therefore, they must

show that their claim satisfies all of the elements of the five-part test. Because the Hayses cannot demonstrate a public interest impact or injury and resulting damage, they cannot establish all of the required elements and their claim fails.

The Hayses first contend State Farm violated 284-30-370[10] by failing to complete its investigation in a timely manner. Br. of Appellants at 24. Their argument is misplaced and fails to consider the full text of the regulation.

That State Farm may not have completed its investigation within 30 days of the Hayses' claim is immaterial because the regulation specifically provides that the 30 day deadline applies "*unless* the investigation cannot reasonably be completed within that time." WAC 284-30-370 (emphasis added). As the Hayses acknowledge, the first appraisal State Farm obtained less than one month after the fire was low. Br. of Appellants at 6. State Farm ordered another one, which was completed by May 3, 2010. It promptly issued a check to the Hayses for the actual cash value of

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[10] WAC 284-30-370 states:

> Every insurer must complete its investigation of a claim within thirty days after notification of claim, *unless the investigation cannot reasonably be completed within that time.* All persons involved in the investigation of a claim must provide reasonable assistance to the insurer in order to facilitate compliance with this provision.

(Emphasis added).

the home as determined by that second appraisal. CP 21. It was in no way unreasonable for State Farm to take the time to obtain a second appraisal as part of its investigation into the value of the Hayses' dwelling loss.

The Hayses next argue State Farm violated WAC 284-30-330(2)[11] by failing to act reasonably promptly when communicating with respect to their claim. Br. of Appellants at 4. The evidence contradicts their arguments.

The Hayses provided no admissible evidence that they attempted to communicate with State Farm prior to their October 17, 2010 letter to which State Farm promptly responded. CP 71. For example, they did not provide any telephone records or letters during discovery or as part of their opposition to summary judgment to substantiate the calls and communications they allege they made to State Farm prior to October 2010. State Farm, on the other hand, provided a detailed chronology of the communications it received from the Hayses and its prompt responses thereto. CP 71.

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[11] WAC 284-30-330(2) defines an unfair method of competition and unfair or deceptive act or practice as the "[failure] to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies."

The Hayses also contend State Farm violated WAC 284-30-330(4)[12] by unreasonably relying on the Country Town appraisal because they believe it did not take into consideration the extensive remodeling of and updates to the home. Br. of Appellants at 25. Their argument is undermined by the appraisal itself, which indisputably took into consideration *both* the remodel and the upgrades. CP 76-90.

The Hayses next argue State Farm violated WAC 284-30-330(6)[13] by failing to effectuate a prompt, fair, and equitable settlement. Br. of Appellants at 26. According to the Hayses, State Farm's violation is firmly established in the disparity between the independent appraiser's valuation and the Country Town valuation upon which State Farm relied. *Id.* That the two appraisers reached different valuations does not revive their summarily dismissed claim.

State Farm's valuation was not unreasonable or inequitable given the circumstances of the claim. Just because the Hayses believed their home was worth more does not make State Farm's

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[12] WAC 284-30-330(4) defines an unfair method of competition and unfair or deceptive act or practice as the "[refusal] to pay claims without conducting a reasonable investigation."

[13] WAC 284-30-330(6) defines an unfair or deceptive act or practice as "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear."

valuation unreasonable. By law, insureds are responsible for setting their policy limits. *Suter v. Virgil R. Lee & Son, Inc.*, 51 Wn. App. 524, 528, 754, P.2d 155 (1988) (stating "[I]t is the insured's responsibility to advise the agent of the insurance that he wants, including the limits of the policy to be issued"); *Gates v. Logan*, 71 Wn. App. 673, 76-77, 862 P.2d 134 (1993). The Hayses established their policy limits in their application for insurance in 2000, nearly 10 years before their loss. But they fail to grasp the concept of depreciation and its impact on their claim. State Farm obtained an appraisal in 2010 that undeniably took into consideration the updates made and the age of the structure itself, something the Hayses continue to ignore.

The Hayses assert with little analysis that State Farm violated WAC 284-30-330(7)[14] by offering to settle their claim for less than its actual value, which forced them to demand and participate in what they characterize as an appraisal. Br. of Appellants at 26-27. That the Hayses disagreed with the amount of their recovery does not mean that they were not paid until they

[14] WAC 284-30-330(7) provides that "[c]ompelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings" is an unfair and deceptive act or practice.

demanded an appraisal. They were paid. But more to the point, they never demanded an appraisal and instead suggested a dispute resolution proceeding with Howsen. CP 73.

State Farm paid almost $49,000 for the Hayses' dwelling loss. Howsen awarded the Hayses $70,000 for their dwelling loss, which included $10,000 that State Farm had already agreed to pay as a minimum for the damage to the deck/porch. CP 73. The amount awarded, especially when factoring in the deck/porch payment that State Farm had already agreed to pay, is not substantially more than what State Farm had previously paid. Furthermore, the Hayses were not required to submit to an appraisal or litigation to obtain recovery. They submitted a claim that State Farm *paid*. The parties only resorted to a dispute resolution proceeding to resolve their dispute over the value of the claim. There was no formal appraisal, litigation, or arbitration as would be required before WAC 284-30-330(7) applied.

Finally, the Hayses argue State Farm violated WAC 284-30-330(13)[15] by failing to provide a reason why their valuation was wrong or why their home was not a pure manufactured home.

[15] WAC 284-30-330(13) states that it is an unfair method of competition and unfair or deceptive act or practice to "[fail] to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement."

Br. of Appellants at 27. They ignore the evidence that undermines their claim.

The Hayses simply refuse to acknowledge that State Farm sent them a letter along with a check on May 3, 2010 documenting the bases for the actual cash value payment. State Farm had no reason to know that the Hayses had not received its explanation or that they did understand that explanation until their October 2010 correspondence relaying their concerns. State Farm immediately responded to that letter, explaining the nature of the payment verbally and in writing. The Hayses simply have no facts to support this claim.

Even assuming the Hayses established that State Farm's actions violated the WAC regulations, an assumption with which State Farm disagrees, they failed to satisfy all five elements of a CPA claim. For this reason, the trial court properly dismissed their claim on summary judgment. *Hangman Ridge*, 105 Wn.2d at 793.

Although the parties did not brief the public interest element, the trial court raised it *sua sponte* during the hearing. ROP 6-9. The parties argued the element, asserting contradictory positions. ROP 6-8. The trial court ultimately concluded dismissal was

appropriate because the Hayses failed to establish that any alleged delay caused them damages. ROP 9.

The Hayses fail to address the public interest element on appeal. Br. of Appellants at 19-28. Even if they had, they cannot prove an unfair or deceptive act or practice impacting the public interest. To show that a defendant engaged in an unfair or deceptive act or practice, a plaintiff must demonstrate that "the alleged act had the capacity to deceive a substantial portion of the public." *Hangman Ridge*, 108 Wn.2d at 785. Implicit in the definition of "deceptive" is that the defendant "misrepresented something of material importance." *See, e.g., Potter v. Wibur-Ellis Co.,* 62 Wn. App. 318, 327, 814 P.2d 670 (1991) (noting a failure to reveal a material fact known to the seller and that the seller in good faith is bound to disclose, may be classified an unfair or deceptive act due to its inherent capacity to deceive). Simply stated, State Farm did not misrepresent anything of material importance to the Hayses.

Additionally, the Hayses fail to prove that State Farm's alleged WAC violations proximately caused injury to business or property. The absence of such proof is fatal to their claim. *Ledcor Indus. (USA), Inc. v. Mut.of Enumclaw Ins. Co.*, 150 Wn. App. 1, 12-

13, 206 P.3d 1255 (2009) (holding there is no remedy under the CPA without a showing of proximately caused injury); *Schmidt v. Cornerstone Invests., Inc.,* 115 Wn.2d 148, 167, 795 P.2d 1143 (1990).

As a threshold issue, the Hayses' arguments on proximate cause are confusing at best and unsupported by the evidence at worst.[16] Although they claim they were injured by having to pay the mortgage on a home they could not use from May 2008, "when additional living benefits were terminated," to October 2010 and were denied "rightful possession of funds . . . until October 2009," their arguments have no temporal nexus to their claims against State Farm. The fires occurred in February 2010. The Hayses do not dispute that State Farm paid additional living expenses as their policy required through February 2012 and admit that it paid the remaining balance on their dwelling claim in January 2012. They fail to articulate any material facts to support their claim that they suffered any injury from State Farm's actions.

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[16] For example, the Hayses inexplicably assert they incurred $26,000 in appraisal costs. Br. of Appellants at 29. But they never had an appraisal done, never participated in a formal appraisal process, and never provided admissible evidence or documentation to support those costs. On the contrary, State Farm paid for the Country Town appraisal and the required dispute resolution fees.

The Hayses also refer to "pernicious and deliberate" acts by Liberty Mutual. Br. of Appellants at 28. But Liberty Mutual is neither a party to nor in any way involved with this case.

Even construing all facts and reasonable inferences in the light most favorable to the Hayses, they failed to allege the existence of *material* facts sufficient to establish the elements of a CPA claim against State Farm. Summary judgment dismissal of this claim was therefore appropriate.

B. The Hayses Are Not Entitled To Attorney Fees Even If They Prevail On Appeal

Pursuant to RAP 18.1(b), a party seeking attorney fees on appeal must devote a section of the opening brief to a request for such fees. A party who fails to comply with this procedure is not entitled to an award of attorney fees even if he or she prevails on appeal. *See, e.g., Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 772 n.17, 162 P.3d 1153 (2007).

The Hayses did not request an award of attorney fees on appeal in their opening brief. Br. of Appellants at i. Any attempt to correct that oversight by requesting attorney fees in reply would come far too late. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (noting an issue raised and argued for the first time in a reply brief comes too late to warrant consideration); *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) (noting the appellate courts do not consider issues raised for the first time in a reply brief). Accordingly, the

Hayses are not entitled to an award of attorney fees on appeal even if they prevail.

V. CONCLUSION

The Hayses fail to raise a material issue of fact regarding State Farm's alleged bad faith processing or investigation of their claim. Additionally, they fail to establish with specific evidence that they were harmed by State Farm's allegedly bad faith acts. This Court should not accept at face value argumentative assertions or unsupported affidavits of the nonmoving party. *Dombrosky v. Farmers Ins. Co. of Wash.*, 84 Wn. App. 245, 253, 928 P.2d 1127 (1996). State Farm's evidence that it acted reasonably and in good faith coupled with the Hayses' failure to establish that it engaged in an unfair or deceptive act that had the capacity to deceive the public and lack of evidence of any injury caused by any alleged acts of bad faith support the trial court's decision to dismiss the Hayses' claims as a matter of law.

The trial court properly granted summary judgment in favor of State Farm. This Court should affirm and award costs on appeal to State Farm pursuant to RAP 14.2.

DATED this 20th day of April, 2015.

Respectfully submitted,

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DECLARATION OF SERVICE

The undersigned declares and states that on the date listed below I deposited with the U.S. Postal Service, postage prepaid, a true and accurate copy of the Brief of Respondent State Farm Fire and Casualty Company for service on the following parties:

Spencer Freeman	☐ via Electronic Service
Freeman Law Firm, Inc.	☐ via Legal Messenger
1107 ½ Tacoma Ave. S.	☑ via Electronic Mail (courtesy)
Tacoma, WA 98402	☑ via U.S. Mail
sfreeman@freemanlawfirm.org	☐ via Facsimile

Original and one copy filed by legal messenger with:

Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402-4427

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 20th day of April, 2015 at Seattle, Washington.

/s/ Marlisa Lochrie
Marlisa Lochrie

LEWIS BRISBOIS BISGAARD SMITH LLP

April 17, 2015 - 4:58 PM

Transmittal Letter

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